

MAY 7, 1984

ALEXANDER L. STEVAS

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No. 83-1594

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JOSEPH A. LaSCALA,

Petitioner,

-against-

BURLINGTON NORTHERN, INC.,

Respondent.

**PETITIONER'S REPLY BRIEF ON PETITION FOR A WRIT
OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF MINNESOTA**

WILLIAM G. JUNGBAUER
YAEGER & YAEGER

247 Third Avenue South
Minneapolis, MN 55415
(612) 333-6371

and

O. C. ADAMSON, II
MEAGHER, GEER, MARKHAM, ANDERSON,
ADAMSON, FLASKAMP & BRENNAN

2250 IDS Center
Minneapolis, MN 55402
(612) 338-0661

Counsel for Petitioner

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ARGUMENT

I.

**CONTROLLING FEDERAL LAW MANDATED THAT THE
JURY BE INSTRUCTED ON THE FEDERAL RAILROAD
ADMINISTRATION REGULATIONS.**

Respondent asserts that Petitioner Joseph LaScala "did not call any witnesses to testify to any violations" of the FRA regulations, so that the court properly refused to read Petitioner's requested instruction No. 47 on the contents of the regulations and the legal effect of their violation. Respondent's Brief at 5; Requested Instruction No. 47, Petitioner's Brief, A-1 to A-3. Respondent's assertion is directly contradicted by the testimony summarized in Peti-

tioner's Brief. Petitioner's witnesses and Respondent's section foreman, track walker, trainmaster and roadmaster referred specifically to the FRA regulations by name and testified to facts regarding their violation. Petitioner's Brief, at 4-6. Federal law required that the trial court instruct the jury on the regulations and on the legal effect of their violation, which was precisely what Petitioner had requested in instruction No. 47.

Additionally, Respondent has selectively and deviously cited to the record below regarding jury instructions in an apparent attempt to create the impression that Petitioner withdrew his request for an instruction on the FRA regulations. Respondent's Brief, at 6-7. Respondent's argument relates to a dissimilar instruction regarding an itemization of particular acts of alleged negligence by the railroad (T. 687-88). This instruction was withdrawn. *Id.* However, Petitioner did not withdraw the requested instruction No. 47 on the FRA regulations, an instruction that was requested on the day following the dissimilar instruction that Respondent confuses with the FRA instruction. See T. 700-01, reprinted at Petitioner's Brief, A-4 to A-5.

II.

FEDERAL LAW REQUIRED THAT THE COURT FIND A VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACT AS A MATTER OF LAW.

The relevant portion of the Federal Safety Appliance Act required that the engineer be able to *apply and release* all power brakes on all cars of the train to control the train's speed. Petitioner's Brief at 8-9. Respondent's statement that "the only evidence which Petitioner points to is testimony from one witness, Richard Newburn, that a single hand brake" was tied down is contradicted by Respondent's

admission in an answer to an interrogatory. In the interrogatory answer, which was read to the jury, the railroad conceded that "a hand brake was partially tied down," T. 336-38, confirming and supporting Newburn's testimony as to a violation. (T. 210-12). The partially tied down hand brake could be activated or applied to a greater degree by the engineer, but the railroad has always acknowledged that the engineer could not have *released* the tied-down brake. Therefore, the brakes could not have been "used and operated by the engineer" to "control its speed" in contravention of the federal statute, establishing a violation as a matter of law.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, Joseph LaScala respectfully requests that the Court grant his petition for a writ of certiorari.

Dated: May 3, 1984.

Respectfully submitted,

YAEGER & YAEGER

William J. Jungbauer

247 Third Avenue South

Minneapolis, MN 55415

(612) 333-6371

and

MEAGHER, GEER, MARKHAM, ANDERSON,

ADAMSON, FLASKAMP & BRENNAN

O. C. Adamson, II

2250 IDS Center

Minneapolis, MN 55402

(612) 338-0661

Counsel for Petitioners